85-1833

Supreme Court, U.S.
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NO.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

ALFRED T. STANGER,

Petitioner,

-VS-

UNITED STATES OF AMERICA,

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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6 pp

QUESTION PRESENTED FOR REVIEW

In a bribery prosecution, where the alleged "official acts" of a government employee were a crucial element of the charge to the jury, did the trial court's supplemental instruction, purporting to define "moonlighting" informally, confuse the jury and prejudice petitioner, warranting reversal under the plain error rule?

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

Plaintiff:

United States of America

DEFENDANTS:

Alfred T. Stanger

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Federal Rule of Criminal Procedure 52(b)

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

ALFRED T. STANGER, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner Alfred T. Stanger respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in the above-entitled proceedings on March 5, 1986.

OPINION BELOW

The opinion of the Court of Appeals for the Second Circuit was not reported and is reproduced in the Appendix annexed hereto. The District Court's Ruling on Stanger's Motion for New Trial, also unreported, is

also reproduced in the Appendix. Portions of the trial transcript relevant to this petition may be found in the Appendix at pp. A. 5-16.

GROUNDS FOR JURISDICTION OF THE COURT

The judgment of the United States Court of Appeals for the Second Circuit was entered on March 5, 1986. A timely Motion for Stay of Mandate was granted on April 14, 1986, and this petition for certiorari is filed within 60 days of the date of judgment. Jurisdiction is invoked under 28 U.S.C. §1254(1).

TEXT OF STATUTE INVOLVED

18 U.S.C. §201(b):

§201. Bribery of public officials and witnesses

(b) Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public

official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent--

(1) to influence any official act; or

(2) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(3) to induce such public official or such person who has been slected to be a public official to do or omit to do any act in violation of his lawful duty,

...

Shall be fined not more than $10,000.00 or imprisoned for not more than two years, or both.

STATEMENT OF THE CASE

On July 17, 1984 a Grand Jury in Hartford returned a 73 count indictment against three defendants--petitioner

Stanger, Jack R. Mason and Ramiro Chavarria. All three were charged in Count One, under 18 U.S.C. §371, with a conspiracy to bribe Chavarria, a government employee, and to defraud the government of his loyal and faithful services.

In Counts Two through Thirty Seven, Stanger and Mason were each charged with having corruptly bribed Chavarria with intent to influence his official acts, 18 U.S.C. §201(b). Each of the charges related to one of a series of monthly checks paid between February of 1980 and January of 1983. Counts Thirty Eight through Seventy Three accused Chavarria of having accepted bribes in violation of 18 U.S.C. §201(c), for each of the checks.

Chavarria pleaded guilty to Count One shortly thereafter, but had not yet been sentenced when the case went to trial

against Stanger and Mason before Hon. Peter C. Dorsey on June 19, 1985. The remaining substantive counts against him were dismissed on motion of the government when he was subsequently sentenced.

Both remaining defendants testified in the course of a three week trial. it was admitted that Stanger's company had paid monies regularly to Charvarria but there were sharp disputes as to the defendants' intent concerning whether it had anything to do with Chavarria's official acts.

The evidence concluded on July 9, 1985 and Judge Dorsey charged the jury early on July 10th. Defendant Stanger had requested that the jury be instructed that they could return a guilty finding on Count One only if they found that Mason and Stanger had conspired, and not if they found that only

one of the defendants on trial had conspired with Chavarria to bribe the latter. The requested instruction was rejected and the jury was charged that they might properly find a conspiracy to bribe Chavarria among any two of the three named defendants.

Obviously troubled by the "official act" element of the offense, the jury later that day submitted a question to the court, inquiring if there exists a regulation which prohibits government employees from taking money or payment "for work that is pertaining to the same job capacity, otherwise known as moonlighting?" (A. 11-12). Although, after consultation with counsel, all agreed that the jury should be instructed simply that any such regulation would not be relevant or controlling, the

court proceeded to confuse the issue by telling the jury panel that its conception of moonlighting was different from theirs.

A day later, the jury returned with another query: "Can there be bribery without conspiracy?" (After receiving a simple "yes" answer to that question, the jury late that afternoon returned with its verdicts. Mason was acquitted on all counts. Stanger was acquitted on the conspiracy charge but convicted of all the bribery offenses.

Defendant Stanger filed a Motion for New Trial which was denied by Judge Dorsey on September 30, 1985. On the same day, the court imposed sentence as follows: A split sentence of three years, suspended after six months on Count Two; three years probation upon his release, and 1250 hours of community service as a special condition

of that probation; concurrent three year suspended sentences on Counts Three through Thirty Seven plus a $1,000.00 committed fine on each of those counts.

Defendant appealed timely to the Court of Appeals for the Second Circuit. That court, on March 5, 1986, affirmed the District Court judgment.

REASONS FOR GRANTING THE WRIT

A. THE PLAIN ERROR RULE REQUIRES REVERSAL WHERE THE TRIAL COURT'S ERROR AFFECTED THE JURY'S DELIBERATIONS AND PREJUDICED PETITIONER'S SUBSTANTIAL RIGHTS.

1. The Jury's Question.

This case went to the jury hotly disputed on the facts. There was no issue concerning whether a government employee was paid. There were very serious questions, however, concerning whether the money was paid with corrupt intent--and

whether it was intended to or did affect any "official act" of the government employee.

At about noon on its first day of deliberations, the jury sent a written question to the court asking, "Is there a regulation stating that U. S. employees cannot take money or payment for work that is pertaining to the same job capacity, otherwise known as moonlighting?" After stating to counsel that the court's understanding of the term "moonlighting" differed from what it perceived the jury's view to be, Judge Dorsey suggested that the proper response would be to instruct the panel that "any regulation governing a United States employee's duties is not relevant nor [sic] controlling as far as this case is concerned." Counsel agreed to

such an instruction.

When the jury returned, however, the court did not so limit its answer; rather, it told the jury:

> In the first place, I think it may be that moonlighting as a concept is a little different from somebody performing their employment and getting extra pay or different pay for it.
>
> Moonlighting more is in the connotation of, you work here today for me eight hours, you go to work for somebody else, maybe related or same kind of work but it's a different, entirely separate kind of thing.
>
> So therefore, I'm going to answer the question without regards to the reference to moonlighting, and that's the question, is there a regulation stating U. S. employees cannot take money or payment pertaining to the same job capacity? The question of the regulation or control or any limitations on the employment of an employee of the government is not relevant to this case and it's not therefore controlling as far as your deliberations are

concerned.

I think that answers that question."

(A. 276-7) In its response, the trial court committed plain error which was prejudicial to petitioner. The Court of Appeals, in affirming the convictions, declined to exercise its power to prevent "a miscarriage of justice" under Rule 52(b).*

2. The Plain Error Rule Requires Full Review of the Record.

This court has stressed that it is not possible for an appellate court to assess the seriousness of the claimed error in a criminal case except by viewing such a

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* F.R. Crim. Pro. 52(b) provides: Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

claim against the entire record. See United States v. Young, ___ U.S.___, 105 S.Ct. 1038,1047 (1985). In this case, the Second Circuit misapplied the strict 'plain error' standard of United States v. Frady, 456 U.S. 152,163 (1982), and failed to follow this Court's guidance as to the purpose of the Rule, which "grants the courts of appeals the latitude to correct particularly egregious errors on appeal regardless of a defendant's trial default." Id.

On the record of this case, the trial court's misleading response to the jury's obvious signal of its own confusion could not have been harmless error. That the court's own ill-chosen words had "an unfair, prejudicial impact on the jury's deliberation" is self-evidently greater and

even more immediate than the impact of the prosecutor's misconduct in closing argument which this Court reviewed in Young. In Young, although the prosecutor's highly improper remarks in summation were found to amount to "error", this Court held that

> "any potential harm . . . was mitigated by the jury's understanding that the prosecutor was countering defense counsel's repeated attacks . . ."

Young, supra. 105 S.Ct. at 1048. No such "mitigation" could cure the prejudice that occurred here. The claimed errors directly affected the jury's consideration of the crucial issue in this case: whether or not the "official acts" of agovernment employee were corrupted.

Clearly, the jury was already confused as to how to interpret petitioner's payments to the government employee, Chavarria, in the light of the bribery

statute, 18 U.S.C. §201(b). The court's digression on its view of "moonlighting" necessarily had an "unfair, prejudicial impact on the jury's deliberations "on petitioner's testimony in his own defense.

The very fact that petitioner had freely admitted the payments made the explanation of his intent the core of the defense case. Here, it cannot be found beyond reasonable doubt that the error complained of did not contribute to the verdict of guilty on the charge of bribery. See Connecticut v. Johnson, 460 U.S. 73,95 (1983) (Powell, J., dissenting). Viewed against the entire record, the Court of Appeals' finding that:

> the trial court's digression on the meaning of a lay term, moonlighting, which was irrelevant to the case, neither confused the jury nor produced any prejudicial impact . . .

Condoned plain error. (A.3)

3. The Trial Court's Error Undermined The Fairness Of The Trial.

Since the court's influence on the jury "is necessarily and properly of great weight, and his lightest word is received with deference and may prove controlling," Quercia v. United States, 289 U.S. 466,469-70 (1932), the trial judge has a duty to use great care that his expressions of opinion and definitions of terms be given "so as not to mislead, and especially that [they] should not be one-sided." Id.; see also United States v. Peterson, 513 F.2nd 1133,1135 (9th Cir. 1975); (misleading supplemental instruction caused further jury confusion on specific intent, clearly prejudicial and not harmless, in conviction for conspiracy to dispose of

government property without authority). See also United States v. United States Gypsum Co., 438 U.S. 422,464-65 (1978) (trial court's unnecessarily confusing instruction on withdrawal from conspiracy reversible error); United States v. Christmann, 298 F.2nd 651,653 (2nd Cir. 1962) (supplemental instruction "hopelessly muddled" original unambiguous charge on narcotics possession, requiring reversal).*

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* See also United States v. Wolfson, 573 F.2nd 216,221 (5th Cir. 1978) (conviction for preparing fraudulent tax returns reversed where instructions failed precisely and specifically to point to theory of defense; misleading charge not harmless, since court's words "carry an authority bordering on the irrefutable"); United States v. Bolden, 514 F. 2nd 1301,1309 (D.C. Cir. 1975) (inadequate response to jury's query on felony-murder not harmless error where jury clearly indicated confusion as to requisites for "intent").

As such, the trial court's gratuitous dismissal of petitioner's own description of "moonlighting" in his defense was "necessarily . . . received with deference" by the jury, and "may [have been] controlling". Quercia, 289 U.S. at 470. The impact of the court's remarks jeopardized petitioner's right to be tried solely on the basis of the evidence presented to the jury. Young, 105 S.Ct. at 1048.*

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* See United States v. Arthur, 544 F.2nd 730, 736 (4th Cir. 1976) (vague supplemental charge misled jury, blurred distinction between bribery and legitimate good will expenditures, warranting new trial on charge of misapplication of bank funds to pay state officials); United States v. Meltzer 100 F.2nd 739,746 (7th Cir. 1938) (reversal required where court's expression of opinion in charge suggested jury dismiss material exculpatory evidence); see also United States v. Walker, 575 F.2nd 209,214 (9th Cir. 1978) (court's confusing answer to jury question subject to interpretations prejudicial to accused, as to territorial boundaries wherein intent to steal boat occurred.)

This Court has insisted that a criminal conviction must not rest on ambiguous and equivocal instructions to the jury on a basic issue. Bollenbach v. United States, 326 U.S. 607, 613 (1946); Connecticut v. Johnson, 460 U.S. 73,85-86 (1982). See also United States v. Brown, 544 F.2nd 1155, 1159 (2nd Cir. 1976) (supplemental charge precluded jury from considering accused's partial admission and partial denial on narcotics conspiracy charge, reversal required); United States v. Robinson, 545 F.2nd 301, 306 (2nd Cir. 1976) (potentially misleading charge on specific intent not harmless beyond doubt, reversal and new trial required); United States v. Morales, 577 F.2nd 769, 777 (2nd Cir. 1978) (erroneous instruction on inference, failure to "balance" charge on knowledge of narcotics possession possibly

confused jury, new trial ordered); United States v. Wolffs, 594 F.2nd 77,82 (5th Cir. 1979) (entrapment instruction vague, misleading and ambiguous, permitting misinterpratation, held prejudicially erroneous).

Where it cannot be said with fair assurance that the effect of the court's improper charge did not prejudice the defendant, the conviction must be reversed. Connecticut v. Johnson, 460 U.S. at 88 (erroneous charge permitted jury to convict without examining evidence of intent, deprived defendant of fair trial); See United States v. Schor, 418 F.2nd 26,30 (2nd Cir. 1969) (error not harmless beyond doubt where jury's ambiguous question left unclarified; tax auditor's conviction for bribery receipt reversed); United States v. Glick, 463 F.2nd 491,494 (2nd Cir. 1972)

(oversimplistic response to jury's "inherently dangerous inquiry" on leniency highly prejudicial.)*

When both erroneous and correct theories are presented to the jury in the court's instructions, the erroneous language is presumptively injurious, "unless it affirmatively appears that [it was] harmless." Fillippon v. Albion Vein Slate Co., 250 U.S. 76, 82-83 (1919); Nicola v. United States, 72 F.2nd 780, 787 (3rd Cir. 1934) (error in charge prejudicial, since impossible to determine

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* The Glick Court noted that reversal was required under either the "harmless beyond a reasonable doubt" standard of Chapman v. California, 386 U.S. 18 (1967) or "fair assurance that the verdict was not affected" of Kotteakos v. United States, 328 U.S. 750 (1946), adopting neither standard in that case.

which theory jury followed).*

In United States v. Bright, 517 F.2nd 584, 587-88 (2nd Cir. 1975), a conviction for possession of stolen mail was reversed on the ground that the Court of Appeals was not convinced that the jury had applied the proper standard in weighing the appellant's "knowledge," hence her guilt or innocence

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* See also United States v. Glick, supra, 463 F.2nd at 495; Robinson supra, 545 F.2nd at 306; United States v. Benedetto, 558 F.2nd 171, 176, 178 (3rd Cir. 1977) (uncertainty whether jury did not follow erroneous instructions, conviction vacated); United States v. Calloway, 562 F.2nd 615, 618 (10th Cir. 1977) (substantial likelihood of prejudice, jury confusion perpetuated by trial court's supplemental charge on interstate car theft); United States v. Annese, 631 F.2nd 1041 (1st Cir. 1980) (prejudicially erroneous "agency" instruction mandates reversal, new trial); Petrycki v. Youngstown and N.R. Co., 531 F.2nd 1363, 1367-68 (6th Cir. 1976) (absent affirmative evidence to contrary, supplemental instruction on ad damnum presumptively prejudical).

of the offense. The jury had "zeroed in" on the question left open in the court's charge, sending the judge a note which read: "Request clarification of the term 'reckless disregard' as pertains to whether defendant had knowledge of whether checks were stolen." 517 F.2nd at 588. The court's response failed to give the "clarification" requested, and failed properly to explain "the ultimate concept of mens rea." 517 F.2nd at 587. In the instant case, the jury's question on "moonlighting" likewise signalled that they were groping with the crucial issue on the bribery charges: whether, by employing Chavarria, petitioner specifically intended to "influence an official act" of a

public official.*

Of course, the jury must understand that to convict, it must find beyond a reasonable doubt that petitioner wilfully and knowingly paid Chavarria for services rendered "on government time," rather than (as the defense contended) for work as a consultant, commonly describable as "moonlighting". As the Bright court observed,

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* See United States v. Irwin, 354 F.2nd 192, 197 (2nd Cir.) cert. denied, 383 U.S. 967 (1965), on the specific intent requirement of §201 (b,c,d,e): "Ordinarily, one is not guilty of a crime unless he is aware of all those facts which make his conduct criminal. That awareness is all that is meant by the mens rea, the 'criminal intent' necessary to guilt . . . The state of mind with which the act is done is an essential element which the government must prove."

> Though some may say, quite properly, that subtle nuances in a judge's charge fall on deaf ears, there is no assurance that this is so. The juror's difficult task of probing the mind and will of another person is hard enough with the aid of a charge that balances the countervailing considerations. His verdict become suspect when he has not had the benefit of a balanced instruction of the court.

517 F.2nd at 587.

4. The Trial Court's Ad Lib Response Increased the Jury's Confusion and Improperly Influenced Their Deliberation on the Bribery Issue.

This Court has found that where the judge's "last word" to the jury is apt to be decisive, a misleading supplemental charge that confuses rather than clarifies a vital issue is not cured by a prior unambiguous and unexceptionable instruction. See Bollenbach, supra, 326

U.S. at 612; United States v. Ronder, 639 F.2nd 931, 934 (2nd Cir. 1981) (court's wording, in response to jury question re evidence of conspiracy in scheme to file false corporate tax returns, failed to balance charge and to clarify issue at critical stage of trial); United States v. Velez, 652 F. 2nd 258,262 (2nd Cir. 1981) (substantial prejudicial impact on jury found in court's erroneous response to request for clarification on conspiracy, possession and importing cocaine counts, overshadowing original correct charge).

In United States v. Stephens, 569 F. 2nd 1372 (5th Cir. 1978), the Fifth Circuit reversed a conviction for car theft because the trial court's impromptu answer to the deliberating jury's question on the meaning of "knowingly" was incorrect and misleading, notwithstanding that the

definition of "actual knowledge" in the original charge was correct and the court had cautioned the jurors to consider the supplemental definition in light of the entire charge. 569 F. 2nd at 1374. The Court of Appeals observed that the cautionary language did not balance the misleading supplemental instruction, noting that

> when the jury has zeroed in on a critical issue, accurate instructions take on maximum importance.

Id. See also Bright, supra, 517 F.2nd at 588; Brown, supra, 544 F.2nd at 1159.

Similarly, in Arthur, supra, 544 F.2nd at 736, when the jury requested supplemental instruction, the trial court repeated its original charge on bribery but not the one on legitimate business expenditure, "thereby diluting or destroying any remedial effect the latter

might have had." Since the jury's determination of whether the appellant had used bank money to bribe state officials or for legitimate "good will" was at a critical stage, the Fourth Circuit found that the vagueness injected by the court's supplemental response rendered the instructions as a whole fatally defective, warranting remand for a new trial. In addition, the court's loose definitions of "intent" and "injure" in response to another jury question were clearly erroneous, in that the court failed to look to relevant statutory meanings, but rather permitted the jury to draw an inference of specific intent to bribe by conclusive presumption.

The erroneous charge deprived the appellant of his opportunity to try to "dissuade the jury from drawing the permissible inference" from the evidence

Here, the trial court's ad hoc comments on the "irrelevance" of "moonlighting" cannot be said to have had no prejudicial impact on the jury's consideration of Stanger's defense as to the payments he made to Chavarria. The supplemental charge was therefore clearly erroneous.

In United States v. Anderton, 629 F.2nd 1044 (5th Cir. 1980), reviewing a conviction for conspiracy to bribe and bribery of a special agent of the IRS (the government's chief witness) under 18 USC §201(b), the Fifth Circuit held that the trial court's response to the jury's request for instruction was reversible error. The appellant had raised an entrapment defense. In its charge on entrapment, the court failed clearly to define "agency" with respect to persuasion or inducement by "law

enforcement officers or their agents"; when during its deliberation the jury sent a note, asking if appellant's "contact man" with the IRS offical "could be considered acting as an agent of the government"--indicating its confusion--the court "dealt with the jury's question in a cursory manner, skirted by a reply that 'agency' was a question for the jury to decide." 629 F.2nd at 1049. Here, in contrast, the court arbitrarily supplied the comment that "moonlighting as a concept is a little different...may be related or the same kind of work, but it's a different, entirely separate kind of thing." Tr. at 1591.

Terms which are reasonably within the common understanding of jurors--not technical or ambiguous--need not be defined

by the court. Here, in a bribery case, where the jury's question touched an essential element of the defense as to specific intent, the court's impromptu definition of "moonlighting" was both unnecessary and harmful. It did not "adequately state the parameters of [petitioner's] defense," 629 F.2nd at 1047, but rather emphatically cast doubt on his defense. As in Anderton, the court's prejudicial instruction failed to guide and instead misled the jury, compounding its confusion as to how to find the facts. 629 F.2nd at 1048.

> "The primary purpose of jury instructions is to define with substantial articularity the factual issues and clearly to instruct the jurors as to the principles of law which they are to apply in deciding the factual issues involved in the case before them. Accordingly, a defendant is

> entitled to a charge which precisely and specifically, rather than merely, generally or abstractly, points to the theory of his defense."

629 F.2nd at 1048, quoting United States v. Gilbreath, 452 F.2nd 992, 994 (5th Cir. 1971) (citations omitted); accord, United States v. Wolffs, supra, 594 F.2nd 77 (5th Cir. 1979); United States v. Wolfson, 573 F.2nd 216 (5th Cir. 1978).*

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* See also United States v. Burns, 683 F.2nd 1056, 1059 (7th Cir. 1982) cert. denied, 459 U.S. 1173, (1983) (court's discussion of "overt act" potentially prejudicial in diverting jury from essential elements of conspiracy charged, reversal required): United States v. Carter, 491 F.2nd 625, 633-634 (5th Cir. 1974) (supplemental ad lib instruction confusing and misleading); Beardshall v. Minute Man Press International, Inc., 664 F.2nd 2, 29 (3rd Cir. 1981) (failure to avoid prejudicial emphasis or to caution as to relevance to orginal full instruction); Ronder, supra 633 F.2nd at 934 (2nd Cir. 1981).

5. In Giving its Supplemental Instruction, the Trial Court Failed to Avoid Prejudicial Emphasis and Did Not Properly Caution the Jury as to the Segment of the Charge to Which its Question Pertained.

Frequently, the attempt to explain understandable language is merely to confuse. Guon v. United States, 285 F.2nd 140, 142 (8 Cir. 1960) (citations omitted). In this case, the trial court's unbalanced supplementary "moonlighting" charge in effect distorted and limited the jury's consideration of Stanger's testimony--that he had hired Chavarria to work "on his own personal time" in an after-hours consulting capacity, and not on the "government's clock." Tr. at 1238. Moreover, the court's response to the jury's request went far beyond the simple "not relevant" which the court and both

counsel agreed would have been a properly impartial answer to the question. The trial court's comments to the jury did not "clarify" the issue of moonlighting, but rather injected ambiguity, creating a clear possibility for prejudice to the defense. Furthermore, it was in substance a departure from both the court's original charge and the agreed-upon supplemental response which counsel had understood was to be given. A. 12. See United States v. United States Gypsum, supra, 438 U.S. at 461 (counsel's acquiescence in court's "clarification" of jury's question on relevance of "other regulations" strictly construed, where judge failed to answer that issue was merely "irrelevant"); United States v. De Hernandez, 745 F.2nd 1305, 1307-08 (10th Cir. 1984) (reinstruction substantially differed from

charge originally given, reversal required); United States v. Kostoff, 585 F.2nd 378, 380 (9th Cir. 1978) (prejudicial error for trial court to accept proposed instruction, then change it in delivering charge); United States v. Annese, supra 631 F.2nd at 1048 agency instruction prejudicially erroneous, injected non-existent factual issue, giving rise to unnecessary risk of jury confusion on entrapment defense); United States v. Christmann, supra, 298 F.2nd at 653 (supplemental instruction "hopelessly befogged" single issue of knowledge in narcotics possession case).

Clearly, discharge of the jury's responsibility depends on discharge of the

> judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria. 'When a jury makes explicit its difficulties,

> a trial judge should clear them away with concrete accuracy.'

United States v. Bolden, 514 F.2nd 1301, 1309 (D.C. Cir. 1975), quoting Bollenbach v. United States, supra, 326 U.S. at 612-13; see also Calloway, 562 F.2nd at 618.

6. Erroneous Instructions Require Reversal, Even Absent Objection, Where Plain Error Affects Substantial Rights of the Defendant.

It is undisputed that the jury's question about "a regulation stating that U.S. employees can take money...for work...pertaining to the same job capacity", was not immediately relevant to the issues of conspiracy and bribery before the jurors. No evidence, and no request to charge on such a regulation, were offered at trial. Nevertheless, the trial court's

response made the jury's question into a problematic issue it then failed to resolve. The court's jumbled distinction between "moonlighting" and "performing...employment and getting extra pay for it [as] a different, entirely separate kind of thing" magnified the question raised and then left it hanging, dismissing both the issue of "regulation" and "moonlighting" as irrelevant.

As such, the supplemental charge allowed a negative inference--that petitioner was guilty of bribery, even if he had established his defense of "extra-curricular" employment of Chavarria and denial of any unlawful intent. See Brown, supra, 544 F.2nd 1159 (supplemental charge negatived defense denying mens rea); Arthur, supra, 544 F.2nd at 736 (supplemental charge blurred distinction between bribery and legitimate

good will expenditure).

It is clear that where an erroneous instruction that compels an improper inference could have been a decisive factor in the jury's verdict, reversal is required. See United States v. McClain, 545 F.2nd 988 (5th Cir. 1977); see also United States v. Noles, 524 F.2nd 1262 (5th Cir. 1975) (trial court's sua sponte comment on "dangerous drugs" amounted to testimony, exceeding discretion, conviction vacated); Robinson, supra, 544 F.2nd at , 619 (limiting instruction too cryptic to dispel possibility of severely unfair prejudice); United States v. Bagby, 451 F.2nd 920, 927 (9th Cir. 1971) (conspiracy instruction "hopelessly confused" jury); Anderton, supra, 629 F.2nd at 1049 (trial court used term "agent" to carry "esoteric" meaning, further misled jury by cryptic response).

This Court must exercise its supervisory power when the Court of Appeals has failed in its duty to guide the District Court and misapplied its power under Rule 52(b). Reversal of the petitioner's conviction is required, and the case must be remanded for a new trial.

CONCLUSION

If Rule 52(b) is to serve the ends of justice as intended, it must be applied in those circumstances as indicated by this Court --when the trial court's error is obvious, or when it otherwise seriously affects the fairness, integrity, or public reputation of judicial proceedings. For the reasons stated, this petition for certiorari should be granted.

Respectfully Submitted,

Ira B. Grudberg
Counsel of Recored

May 5, 1986

NO.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

ALFRED T. STANGER,

Petitioner,

-VS-

UNITED STATES OF AMERICA,

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

APPENDIX TO

PETITION FOR A WRIT OF CERTIORARI

IRA B. GRUDBERG, ESQ.
350 Orange Street
New Haven, Connecticut 06503
Counsel for Petitioner

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appealos for the Second Circuit, held at the United States Courthouse in the City of New York on the 5th day of February, one thousand nine hundred and eighty-six.

P R E S E N T :

HONORABLE THOMAS J. MESKILL,

HONORABLE AMALIA L. KEARSE

HONORABLE GEORGE C. PRATT,,

Circuit Judges.

----------x

UNITED STATES OF AMERICA, No. 85-1402

Appellee,

-against-

ALFRED T. STANGER,

Defendant-Appellant,

----------x

This appeal from a judgment of the United States District Court for the District of Connecticut came on to be heard on the transcript of record and was argued

by counsel.

ON CONSIDERATION WHEREOF, it is ordered that the judgment appealed from is affirmed.

Alfred Stanger was convicted, after a jury trial, of 36 counts of bribing a government official in violation of 18 U.S.C. § 201(b). On appeal, he urges two gounds for reversal; both are without merit.

1. Stanger contends that the trial court's response to a jury question concerning the existence of a government regulation prohibiting "moonlighting" by government employees confused the jury and had prejudicial impact on the defense. Since defense counsel failed to object to the court's response at the time it was given, Stanger must show that the judge's comments constituted "plain error". We see no such error. The jury was properly instructed that any such regulation of government was "not relevant to this case and it's not therefore controlling as far as your deliberatons are concerned." Thus, the jury's attention was kept properly focused on the critical issue -- Stanger's

intent in making the payments. On that issue, the evidence against Stanger, including the bribed employee's testimony and his documentation of digression on the meaning of a lay term, moonlighting, which was irrelevant to the case, neither confused the jury nor produced any prejudicial impact on defendant. Thus, there was no plain error. See United States v. Frady, 456 U.S. 152, 163, 163 n. 14 (1982) (plain error reversal warranted "solely in those circumstances in which a miscarriage of justice would otherwise result"); see also United States v. Wilkinson, 754 F.2d 1427, 1432 (2d Cir.), cert. denied, 105 S. Ct. 3482 (1985).

2. Stanger also argues that the trial judge erred in excluding the proffered testimony of FBI special agent O'Keefe. We disagree. It appears that the primary purpose of introducing the agent's testimony was to prove the broad scope of the governent's investigation of Stanger and his company as early as 1983, most of which had proved unfruitful. Given the marginal relevance of such evidence and the high probability of jury confusion and delay inherent in such testimony the trial judge acted well within his discreton under Rule 403 of the Federal Rules of Evidence

in excluding the proffered testimony. Fed. R. Evid. 403; United States v. Medico, 557 F.2d 309, 317-18 (2d Cir.), cert. denied, 434 U.S. 986 (1977); see also United States v. Bowe, 360 F.2d 1, 15 (2d Cir.), cert. denied, 385 U.S. 961 (1966).

A F T E R N O O N S E S S I O N

Opened at 1:45 o'clock P.M.

THE COURT: We had a question from the jury.

I have had a note which I received about twenty-five minutes ago that I will read and mark as Court Exhibit 1, please. Let us have the definition of consipiracy that you read to us earlier. Robert Blackman.

That will be marked Court Exhibit 1.

Now, he's only asked for the definition and I think that's the way that I would propose to answer would be to say to them there are really two offenses charged here. One is conspiracy Count One, he second is bribery. Conspiracy as alleged is a conspiracy to bribe and simply tell them that there is a separation. Two separate offenses. One is conspiracy, one is the

bribery and one is the conspiracy. And read them the statute which is on page twenty and then simply, and I found a little bit simpler maybe definition if you will, of conspiracy in a manual out of the Ninth Circuit that reads as follows: A Conspiracy is kind of a criminal partnership, an agreement of two or more people to do something unlawful. The crime is the agreeent to do something unlawful. It does not matter whether it was successful or not.

And I think in that way I have answered their question because if you get into anything further you get into the elements, you get into the methods of proof and we all know that's seven or eight pages, nine papges long. And the risk always, of course, is saying too little and saying too

much. They have asked simply for the definition. If all I tell them a little bit of the background as to, against which this is to be deciding and just define what conspiracy is, that answers their question.

Now, what do you have to say about that?

MR. KEEFE: Well, your Honor, may I respectfully suggest simply re-reading page twenty combined with your initial prefacing remark that there are two charges and it is a conspiracy to bribe here.

THE COURT: The only trouble with that, Mr. Keefe, is that the statute in and of itself I don't think answers their question. That is why the two additonal, two or three additional sentences that I proposed tells them the definition.

MR. KEEFE: May I hear that Ninth

Circuit definition again, please?

THE COURT: A conspiracy is kind of a criminal partnership and agreement. I would rephrase that. I frankly would say, as I did in the original charge, a conspiracy is kind of a, is an agreement, a kind of criminal partnership of two or more people to do something unlawful. The crime is the agreement.

MR. KEEFE: I don't have any problem with that, your Honor. It is the word partnership I think in the context of this case that I would object to. It is really an elaboration on what you told them this morning and in this case it has, I think, a prejudicial connotation to these defendants. They were partners in a business and I would object to that part of

it.

THE COURT: I don't to unduly stress the partnership which may have an overhand from their otherwise legitimate business relationship. So there is no magic of using the word, that phrase has been used repeatedly and with approval.

MR. GRUDBERG: One moment, your Honor.

THE COURT: Yes. Go ahead, Mr. Grudberg.

MR. GRUDBERG: I would have no objection to that, your Honor, as a possible alternative if your Honor would wish you would be using the exact same words you used this morning if, in terms of the definition you read as far as breaking the two offenses apart you read page twenty and then the first, second and fourth sentences of page twenty-one.

THE COURT: That is my first reaction was that was the way to handle it. We have looked and found in this Ninth Circuit seems to be a little bit simpler, but on the other hand --

MR. GRUDBERG: I would have no objection either way, your Honor. It seems to me that is, either way is a fair way to respond to them. I think tough in terms of the third, it your Honor were going to start on page twenty-one as part of an entire charge, the third sentence of --

THE COURT: I wouldn't intend to read the third sentence That begins to get inhto the other aspects of it which I am frank to say I as soon avoid in order to simply answer the question they have asked and avoid creating any problem for anybody.

Does the government have any feeling or

position on the matter?

MR. KURIMAI: No. your Honor. I think it is fine as you suggested.

THE COURT: All right. I think I will use the ninth Circuit language. It may simplify the thing a little bit more.

All right. Bring the jury in.

I have told them, by the way, that I had excused counsel for lunch and that's the reason why there would be a delay getting back to them.

We have another question. They are not using up the paper very quickly.

Well, now, I've another problem.

Mark that as Court Exhibit two.

The next which is unsigned but it's marked Court Exhibit 2, same handwriting so I presume it's Mr. Blackman, but it's not signed by anybody. (Reading.) Is there a regulation stating that U. S. employees

cannot take money or payment for work that is pertaining to the same job capacitate? Otherwise known as moonlighting?. Actually moonlighting is different. Moolighting is an entirely separate job. It may have some of the same characteristics but it's a seperate job as I understand the definition of moonlighting. My inclination is to tell them that any regulation, in answer to their question, that any regulation governing a United States employee's duties is not relevant nor controlling as far as this case is concerned.

MR. GRUDBERG: That's correct.

THE COURT: Is that agreed?

MR. KEEFE: That's agreed.

MR. KURIMAI: Yes.

THE COURT: I don't think of anything that would suggest to the contrary. So

I'll answer that question that way. All right. Maybe the best thing to do is to have them come in and I'll answer that question first so as to clear the air so we don't have it hanging. I don't know whether they're interrelated but just to avoid any problem I'll answer that question first.

(Whereupon, the jury then came into the courtroom).

THE COURT: I trust you got the message, ladies and gentlemen, that I had excused, while you were having lunch I excused the lawyers for lunch and in consequence when your first question was given to me I had excused the lawyers and so therefore, since we can't proceed without them I had to wait until they all got back and that's the reason for the

delay.

I have two questions that you have posed to me. One that I just received and I have marked them as Court Exhibits so they will be part of the record. That's all part of what we do. Everything is on the record so that's what you have asked in the way of quesions is recorded.

I'm going to deal with the first, the second question first and that is a question which reads as follows: Is there a regulation stating that U. S. employees cannot take money or payment for work that is pertaining to the same job capacity otherwise known as moonlighting?

In the first place, I think it may be that moonlighting as a concept is a little difference from somebody performing their employment and getting extra pay or different pay for it. Moonlighting more is

in the connotation of, you work here today for me eight hours, you go to work for somebody else, maybe related or same kind of work but it's a different, entirely separate kind of thing.

So, therefore, I'm going to answer the question without regards to the reference to moonlightinhg, and that's the question, is there a regulation stating U. S. employees cannot take money or payment pertaining to the same job capacity? The question of the regulation or control or any limitations on the employment of an employee of the government is not relevant to this case and it's not therefore controlling as far as your deliberations are concerned.

I think that answers that question.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA :

-vs- : Criminal No. H-84-60

ALFRED T. STANGER :

RULING ON MOTION FOR NEW TRIAL

The question raised by the jury linked "moonlighting" to the existence of a regulation. As discussed with counsel, the connotation of moonlighting was separate from one's performance of his official duties because moonlighting implied working for a second employer. Thus, the further instruction in reply to the jury's question would not deal separately and additionally with moonlighting. Rather, the reply was restricted to the existence of a regulation and the jury was told that there was no regulation that was relevant to this case. To this proposition, defendant had agreed.

Nothing in the further instruction about the existence of a regulation limited the jury's consideration of any question about "moonlighting." Indeed, by indicating there was a separate concept, the jury was not limited in regard to any of the arguments of defendant. It is a surprise to the court that defendant will now base an argument for a new trial on the further charge since the proposed reply was discussed with counsel before it was given to the jury, and all agreed. No substantial variation is found in the version given from the version discussed with counsel, which was not reduced to writing.

Further, when invited, counsel made no comment and took no exception to the reply actually made to the jury. Thus, defendant may not now complain. He accepted the

court's reply as proper and may not now reverse his position after a disadvantageous verdict. If his claim had any merit, any error could have been corrected immediately. No error is apparent, but, in any event, defendant's acquiescense in ther eply cannot be permitted to be reversed now. Even if something was taken away from defendant's argument (a claim with which the court does not agree), it could not constitute plain error.

The court ruled on defendant's attempt to explore Agent O'Keefe's investigative activities after an offer of proof. It was clear that defendant intended to pursue a wide range of irrelevant inquiry. To have allowed defendant to introduce evidence of numerous interviews and to review a substantial number of records would not

have focused on the limited question of whether defendant made the admitted payments in relation to Chavarria's employment. The thrust of the offered evidence was that the government procurement system discourages competition for the prime contractors and that source approvals are handled in an inept, overly-bureaucratic manner. Two wrongs do not make a right. Evidence of the inefficiencies or faults of the system would have led the jury to dwell on extraneous matters. The jury's assessment of Stanger's conduct was not properly to be altered by proof of the improprieties of others.

The ruling at trial has not been shown to be incorrect. Accordingly, defendant's motion for a new trial is denied.

SO ORDERED

Dated at Hartford, Connecticut, this 30th day of September, 1985.

/s/
Peter C. Dorsey
United States District
Judge